

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12-11-2019

CORAM

THE HONOURABLE MR.JUSTICE S.M. SUBRAMANIAM

W.P.No.15244 of 2011

And

M.P.No.2 of 2011

The Management,
Tamil Nadu Forest and Social Forest Department,
Villupuram Division,
Villupuram. ... Petitioner

-vs-

1.Radhakrishnan
2.The Presiding Officer,
Labour Court,
Cuddalore,
Cuddalore District. ... Respondents

Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, calling for the records in I.D.No.215 of 1992 dated 06.02.1995 and consequential impugned order passed by the second respondent in C.P.No.71 of 2007, dated 31.01.2011 and quash the same.

For Petitioner : Ms.Thanga Vandhana Balakrishnan,
Additional Government Pleader (Forests).

For Respondent-1: Mr.K.Elango

For Respondent-2: Labour Court

ORDER

The Award of the Labour Court dated 06.02.1995 passed in I.D.No.215 of 1992 and the consequential order passed in C.P.No.71 of 2007 dated 31.01.2011, are under challenge in the present writ petition.

2. The writ petitioner is the Tamil Nadu Forest and Social Forest Department, which is a Government of Tamil Nadu Department.

3. The learned Additional Government Pleader, appearing on behalf of the writ petitioner-Company, made a submission that the first respondent-employee was engaged as a Nominal Muster Roll Coolie on daily wage basis and he was engaged on need basis. The people of Munnur Village have given a petition against the first respondent-employee stating that he was allowing the cattle to trespass in the Forest Area and he was an accomplice to the illegal falling of the trees. Subsequently, statistics were taken by the Forest Officials and it was found that there was a shortage in the Babul trees to the extent of 34.06%.

4. The Forest Department Officials found that the shortage was due to the negligence on the part of the first respondent while performing his duty as daily wage employee. The Forest Officer concerned of Tindivanam Range informed the first respondent-employee in his letter dated 20.07.1984 that the services of the first respondent-employee was no more required and therefore, the first respondent-employee was discharged from service.

5. The first respondent raised an industrial dispute in I.D.No.215 of 1992 before the Labour Court, Cuddalore for reinstatement with back wages and continuity of service. The Labour Court allowed the industrial dispute in favour of the first respondent-employee and a claim petition was filed in C.P. No.71 of 2007, which was also allowed, against which the present writ petition has been filed.

6. The learned Additional Government Pleader, appearing on behalf of the writ petitioner-Company, states that the first respondent is not entitled to maintain the industrial dispute for the simple reason that the Tamil Nadu Forest Department is governed by the Government of Tamil Nadu and this petitioner executes sovereign function of the State of Tamil Nadu and hence, the Forest Department is not an industry as contemplated under Section 2(1) of the Industrial Disputes Act, 1947. This apart, the first respondent was working with the writ petitioner-Company as daily wage employee on need basis and therefore, he was discharged from service on account of certain complaints. Under these circumstances, entertaining an industrial dispute by the Labour Court itself is erroneous and without any jurisdiction.

7. The learned counsel appearing on behalf of the first respondent-employee disputed the contentions of the learned Additional Government Pleader appearing on behalf of the writ petitioner-Company, by stating that the officials of the Forest Department had discharged the first respondent-employee from service without following the procedures and therefore, the

first respondent-employee is entitled for the relief, which was rightly granted by the Labour Court and there is no infirmity as such.

8. The learned Additional Government Pleader appearing on behalf of the writ petitioner-Company states that the first respondent-employee had given an undertaking that his case may be considered for reinstatement without back wages and he is prepared to forego the benefit of back wages and continuity of service as ordered by the Labour Court. Accordingly, the first respondent-employee was reinstated into service without back wages and continuity of service and subsequently reached the age of superannuation. It is contended by the learned Additional Government Pleader for the writ petitioner-Company that the letter given by the first respondent-employee is binding on him and the Labour Court, in violation of the undertaking given by the first respondent-employee himself, has allowed the claim petition and therefore, the said order is liable to be scrapped.

9. This Court is of the considered opinion that admittedly the first respondent-employee was engaged as daily wage employee in the Forest Department, which is the Government of Tamil Nadu. Thus, the Government Department cannot be construed as an industry as defined under Section 2(1) of the Industrial Disputes Act, 1947. The Forest Department is governed by the Service Rules and its Regulations and various Government Orders and even the daily wage employees (NMRs) are engaged based on certain Regulations and the Guidelines issued by the Government in its orders and all such Government Orders governing the service conditions of the employees are issued under Article 309 of the Constitution of India. Thus, the Service Rules, Regulations and the Government Orders governing post alone will prevail over and the same is to be construed as a Special Law with reference to the appointments in the Government Departments, including the Forest Department.

10. Therefore, the Special Rules in this regard, alone would be applicable and the General Law, including Industrial Disputes Act, 1947, cannot be made applicable to the employees of the Government Departments. As far as the facts and circumstances are concerned, these Government Service Rules are the Special Law and the Industrial Disputes Act is to be construed as a General Law. Thus, the provisions of the Industrial Disputes Act, cannot be applied as the Government Department and the same cannot be continued as an industry and further the Service Rules are already in force in respect of the employees engaged or appointment in Government Departments by the Government of Tamil Nadu.

11. This apart, the Government is executing the sovereign function and therefore, the Special Rules alone will prevail in respect of the service conditions of the employees engaged or appointed into services.

12. The mode of selection, recruitment and reservations are provided in the Service Regulations by the Government Departments. Therefore, such Rules alone will prevail over the General Law and entertaining the industrial dispute under the Industrial Disputes Act, 1947, is not maintainable.

13. It is relevant to cite the judgement of the Division Bench of this Court in the case of L. Justine Vs. Registrar of Co-operative Societies [2003 (1) L.L.N. 315]. The Division Bench framed the Issue No. (ii) as follows :-

"13. The Permanency Act of 1981 is also an Act enacted by the State and received the President's assent. Section 3 of the Act contains non obstante clause and provides protection to workmen, who are in continuous service for a continuous period of 480 days in a period of 24 calendar months in an industrial establishment, thus conferring a status of permanency. 'Industrial establishment' is defined in subSection (3) of Section 2 of the Act and in clause (e) thereof, an 'establishment' as defined in clause 2 (6) of the Tamil Nadu Shops and Establishments Act, 1947, is defined to be an industrial establishment. If we go to Section 2 (6) of the Tamil Nadu Shops and Establishments Act, it is clear that the word 'establishment' therein takes in cooperative society also. As such, there cannot be any doubt regarding the applicability of the Permanency Act of 1981. The word, 'industry' defined in Section 2 (j) (q) under the Industrial Disputes Act, 1947 also makes the cooperative societies susceptible to the Act of 1947. Thus, all such workmen belonging to a class and are afforded protection, are entitled for the benefits of the Permanency Act of 1981 as also the Industrial Disputes Act of 1947."

14. With reference to the above issue, the Division Bench made an observation that "The provisions of either the Permanency Act of 1981 or of the Industrial Disputes Act, 1947, cannot also be pressed into service when the appointments are ipso facto illegal and unauthorized. We cannot accede to the contention that even if the appointment is illegal and unauthorized, merely on the passage of time and completion of

the stipulated period of 480 days under the Permanency Act, 1981 or 240 days under the Industrial Disputes Act, 1947 an indefeasible right accrues to an employee. Such an argument is clearly untenable.

15. In paragraph No.16 of the abovesaid judgement, the Division Bench made an observation that "There is a lot of difference between the irregularity and illegality. The appointments here are not irregular but illegal. Irregular is something which is done in an authorized manner but while doing so, there is some procedural irregularity. Illegality is altogether different. An action is illegal if it is contrary to law. The law in the instant case is so clear that the appointments cannot be beyond the permissible cadre strength."

16. This Court would like to consider the legal principles settled by the Constitution Bench of the Hon'ble Supreme Court in the case of Secretary, State of Karnataka and others Vs. Umadevi and others [(2006) 4 SCC 1]. The Constitution Bench also reiterated that the benefit of regularization or permanent absorption cannot be granted in violation of the recruitment Rules in force.

17. Let us look into the spirit of the judgement little later. Coming back to the judgement of the Division Bench in the case of "L.Justine Vs. Registrar of Co-operative Societies" is that the matter went to the Apex Court and in the case of Uma Rani Vs. Registrar of Co-operative Societies [(2004) 7 SCC 112], the Apex Court also confirmed the views of the Division Bench in the case of "L.Justine Vs. Registrar of Co-operative Societies" and more specifically in paragraph Nos.24 to 41 are extracted hereunder :-

"24. Let us now consider the extent to which the provisions of the 1981 Act would apply to the fact of the present case.

25. The 1981 Act applies only to industrial establishments. Industrial Establishment has inter alia been defined to mean "an establishment as defined in clause (6) of Section 2 of the Tamil Nadu Shops and Establishments Act, 1947 (Tamil Nadu Act 36 of 1947)".

26. Establishment has been defined in Section 2 (6) of the Tamil Nadu Shops and Establishments Act, 1947 as under:

"2. (6) 'Establishment' means a shop, commercial establishment, restaurant, eating house, residential hotel, theater or any place of public amusement or entertainment and includes such establishment as the State Government may by notification declare to be an establishment for the

purpose of this Act."

27. Mr. Balakrishnan urged that the cooperative societies are Commercial Establishments.

28. Whether a Cooperative Society would be a commercial establishment or not would essentially be a question of fact. It cannot be said keeping in view the legislative intent that all cooperative societies would be 'commercial establishments' within the meaning of the Tamil Nadu Shops and Establishments Act, 1947. It, therefore, appears that the impugned Government Order has been issued by the State without proper application of mind. It has furthermore not been stated in the impugned Government Order that all the cooperative societies are commercial establishments within the meaning of Section 2(6) of the Tamil Nadu Shops and Establishments Act, 1947.

29. The Cooperative Societies and the Land Development Banks are governed by the statutes under which they have been created as also the Rules and bye laws framed thereunder. The cooperative societies are obligated to follow the cooperative principles as laid down in the Act and the Rules framed thereunder.

30. The State had framed rules in exercise of its power conferred upon it under Section 180 of the 1983 Act in the year 1988. Rule 149 of the 1988 Rules provides for a complete code as regard the mode and manner in which appointments were required to be made and the process of appointments is required to be carried out. In terms of the said Rule, requirements to possess educational qualification and other qualifications had been laid down. One of the essential qualifications laid down for holding certain posts is 'undergoing cooperative training and previous experience'.

31. At this juncture, we may notice some of the provisions contained in Rule 149 of the 1988 Rules.

32. Sub-rule (3) of Rule 149 read as under:

"149. (3)(a) No appointment by direct recruitment to any post shall be made except by calling for from the societies applications from their employees who possess the qualifications for the post and unless the Government have accorded special sanction for recruitment by advertisement in dailies, by also calling for a list of eligible candidates from the Employment Exchange.

(b) Where the Employment Exchange issues a non-availability certificate or the Government have accorded special sanction for recruitment by

advertisement in dailies, the society shall invite applications from candidates including those working in other societies by advertisements in one English daily and two Tamil dailies having circulation within the area of operations of the society approved by the Government for the purposes of issue of Government advertisements.

(c) Every appointment by direct recruitment shall be made by holding written examination and interview or by holding only interview as decided by the board and on the basis of the rank given with reference to the marks obtained in the written examination, if any, and the marks awarded in the interview:

Provided that nothing contained in this sub-rule shall apply to any of the posts for the recruitment of which a Recruitment Bureau has been constituted under section 74 or in respect of which common cadre of service has been constituted under section 75;

Provided further that nothing contained in this sub-rule shall apply to appointments of dependents of the employees of any society who died or medically invalidated while in service."

33. Sub-rule (4) of Rule 149 mandates that no person shall be appointed to the service of a society if he has on the date on which he joins the post, attained the age of thirty years and in the case of persons belonging to Scheduled Castes and Scheduled Tribes thirty-five years.

34. Sub-rule (25) of Rule 149 provides that the principle of reservation of appointment for Scheduled Castes/ Scheduled Tribes and Backward Classes followed by the Government of Tamil Nadu for recruitment to the State shall apply.

35. No appointment, therefore, can be made in deviation of or departure from the procedures laid down in the said statutory rules.

36. The terms and conditions of services are also laid down in the said rules.

37. The 1983 Act was furthermore amended in the year 1995 providing for cadre strength which is directly relatable to the income of the cooperative societies.

38. Provisions of the Act and the Rules framed thereunder reflect the legislative recruitment policy. The said provisions are, thus, mandatory in nature.

39. Regularisation, in our considered opinion, is not and cannot be the mode of recruitment by any

"State" within the meaning of Article 12 of the Constitution of India or any body or authority governed by a Statutory Act or the Rules framed thereunder. It is also now well-settled that an appointment made in violation of the mandatory provisions of the Statute and in particular ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation. (See State of H.P. Vs. Suresh Kumar Verma and Another, (1996) 7 SCC 562).

40. It is equally well-settled that those who come by backdoor should go through that door. (See State of U.P. and Others Vs. U.P. State Law Officers Association & Others, (1994) 2 SCC 204)

41. Regularisation furthermore cannot give permanence to an employee whose services are ad-hoc in nature."

18. In the case of "Secretary, State of Karnataka and others Vs. Umadevi and others" [hereinafter referred to as "Umadevi case"] the Constitution Bench also reiterated by holding that equal opportunity, being a constitutional mandate, the irregular or illegal appointments cannot be confirmed. The persons entered into public services through back door, must be allowed to go from the door which through they have entered into. Contrarily, mere length of service cannot be taken as a ground for granting the benefit of regularization of permanent absorption. Thus, engaging an employee in an illegal or irregular manner by some authorities or the engagement is through some contractors then they cannot claim permanent status in service by virtue of the general Act viz., the Conferment of Permanent Status to Workmen Act, 1981 and such a claim cannot be considered by the authorities concerned as well as by the High Court. In such circumstances, the entire constitutional scheme is violated.

19. The Constitutional scheme of appointments ought to be followed scrupulously by the authorities competent, while undertaking the process of selection and appointment. In the event of engaging persons on temporary or casual basis, thereafter, granting the benefit of confirmation in violation of the service regulation, undoubtedly is in violation of the Constitutional scheme of appointments and such a situation would amount to an unconstitutional act and therefore, the Court cannot consider such benefit of regularization on regularization or permanent absorption, merely on the ground that they have completed 480 days of service or for a considerable length of time.

20. In view of the fact that the industrial dispute itself was entertained without any jurisdiction by the Labour Court and the claim petition was also allowed without considering the ground raised by the writ petitioner that the Forest Department, which is a Government of Tamil Nadu Department, is not an industry, this Court is of the opinion that the said orders were passed without any jurisdiction. However, the writ petitioner-Forest Department reinstated the first respondent into service and allowed him to continue till his date of retirement. He has reached the age of superannuation and accordingly relieved from service.

21. This being the factum, the impugned Award as well as the consequential claim petitions are not maintainable and the Labour Court has committed an error in entertaining the industrial dispute under the provisions of the Industrial Disputes Act, 1947 in respect of the employees of the Forest Department of Government of Tamil Nadu.

22. This being the principles to be followed, the Award dated 06.02.1995 passed by the Labour Court in I.D.No.215 of 1992 and the consequential order passed in C.P.No.71 of 2007 dated 31.01.2011 are quashed. Accordingly, the writ petition stands allowed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

s/d-

Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

Svn

To

1. The Presiding Officer,
Labour Court,
Cuddalore,
Cuddalore District.

+1 CC to The Spl. Govt. Pleader (Forest) sr 94274

+1 CC to Mr.K. Elango, advocate sr 93719

W.P.No.15244 of 2011

BS (CO)

SP(30/12/2019)